No. 02-916

Supreme Court, U.S.
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In The
Supreme Court of the United States

BECKY M. LITOWITZ,

Petitioner,

vs.

DAVID J. LITOWITZ,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondent David Litowitz respectfully requests this Court to deny Becky Litowitz' petition for writ of certiorari seeking review of the Washington Supreme Court's opinion.

RESPONDENT'S COUNTER STATEMENT

This dispute does not involve any constitutional or federal issues. Instead, the Washington Supreme Court clearly stated that its decision was based solely on state contract law:

> We base our decision in this case solely upon the contractual rights of the parties under the preembryo cryopreservation contract with the Loma Linda Center for Fertility and In Vitro Fertilization dated March 25, 1996.

(Appendix "C," page 24a. to Petitioner's Brief.)

Indeed, the fact that Petitioner is unable to raise a constitutional claim is evident as she has no biological connection to the preembryos. Because Becky Litowitz has no biological connection to the preembryos, the only issue involved in this dispute was the agreement that the parties had reached regarding the disposition of the preembryos made when they began the in vitro process – in other words, a state law contract issue.

A. Definitions

As an initial matter, the Petitioner, at various places in her brief, uses the term "embryos." However, there is no support in the record that the disputed objects here are

embryos. Instead, as the Washington courts have noted, what is at issue are two preembryos. The Washington State court of appeals explained the difference between a preembryo and an embryo:

> Fertilization takes several hours as the twenty-four chromosomes of each gamete (egg and sperm) fuse, yielding a zygote with a unique genome of forty-eight chromosomes. The zygote is then allowed to divide for about three days, until it reaches the two to eight-cell stage. These preembryos, consisting of a few undifferentiated cells, are either implanted or cryopreserved for implantation at a later date. It is not until the cell mass proceeds beyond sixteen cells and implants that it can give rise to an embryo.

Litowitz v. Litowitz, 102 Wn. App. 934, 935, n. 1, 10 P.3d 1086 (Wash. 2000), *rev'd*, 146 Wn.2d 514, 48 P.3d 261 (Wash. 2002).

Petitioner also makes the assertion that she is "the legal mother of these human embryos." (Petitioner's brief at 4.) However, as noted, these are not embryos but instead are preembryos. Further, Petitioner has not cited any legal authority to support her argument that any person could ever be the "mother" of a preembryo, much less a person such as herself who has no biological connection to the preembryo.

Finally, Petitioner asserts: "Because Becky Litowitz is, contractually, the intended parent of the embryos, she is an adoptive and legal parent." (Petitioner's brief at 4.) Petitioner does not cite any authority that would support her claim that she could be characterized under the law as

the "adoptive" parent of a preembryo that is, as noted by the Washington court of appeals, a "few undifferentiated cells."[1]

B. Contractual Background

As part of the in vitro fertilization program into which David and Becky Litowitz participated, they executed three agreements. The Washington Supreme Court held that the only relevant agreement was the one entitled "Consent and Authorization for Pre-embryo Cryopreservation Following In Vitro Fertilization." In that document, the parties agreed that the preembryos would be thawed and not allowed to undergo further development if the prembryos had been maintained in cryopreservation for five years after the initial date of cryopreservation unless both parties requested otherwise. (Appendix "C" at pages 8a-9a.)

The Washington Supreme Court held that the parties were bound by this contractual term and that more than five years had elapsed since the initial date of cryopreservation. (Appendix "C" at pages 19a-20a.)

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[1] The Petitioner also makes some other statements that are inaccurate. At page 3 of her brief, she states, "In March of 1996, as a result of desiring to be a parent" she and David Litowitz enter into the in vitro fertilization program. This is misleading as Becky Litowitz already was the biological mother of two children at that time. *Litowitz v. Litowitz*, 102 Wn. App. 934, 936, 10 P.3d 1086 (Wash. 2000), *rev'd*, 146 Wn.2d 514, 48 P.3d 261 (Wash. 2002). At page 4 of her brief, she represents to this Court that she "has joint legal custody of M." This is false. For the past two years, she no longer had joint legal custody of M and instead is limited to supervised visits with M.

Becky Litowitz is seeking review of the Washington State Supreme Court's decision that was based solely on Washington contract law and in which she could not make a claim that she had any biological connection to the preembryos. Under these circumstances, her request for a writ of certiorari should be denied.

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS CASE DOES NOT MEET THE REQUIREMENTS OF SUPREME COURT RULE 10.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Rule 10 provides guidance as to the types of cases this Court will review from a state court of last resort:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This dispute simply does not involve any federal question, much less an important federal question. Instead, it involves a contract dispute between the parties.

Becky Litowitz, without providing any explanation, argues that the Washington Supreme Court's decision conflicts with the decisions of other state courts of last resort. However, Becky Litowitz fails to acknowledge that the Washington State Supreme Court's opinion did not

decide an important question of federal law. Moreover, the opinions she cites, *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Kass v. Kass*, 91 N.Y.2d 554 (1998); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); and *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) do not conflict with the contract analysis used by the Washington State Supreme Court. Nor are any of those decisions relevant to this dispute because in each of those cases both parties had biological connections to the preembryos – a fact that does not exist here.

In *Davis*, 842 S.W.2d at 588, the court, in dicta, stated that contracts determining preembryo disposition should be enforced. In *Kass*, 91 N.Y.2d at 174, the court upheld a contract that required the preembryos to be donated for research against the desire of the wife who wanted the preembryos to be awarded to her so she could attempt a pregnancy against the husband's wishes. In *A.Z.*, 725 N.E.2d at 1051, the court held that no agreement regarding cryopreserved preembryos would be enforced to compel a party to become a parent against his wishes. In *York*, 717 F. Supp. at 421, the court held that the pre-zygote was property of the husband and wife who were both progenitors and that the contract terms would be enforced. None of these decisions conflict with the decision by the Washington State Supreme Court.

Finally, Becky Litowitz is arguing that this Court should accept review of this case so it can define the term "parent." However, the Washington State Supreme Court's decision was not based on any such ruling. In contrast to the Washington court of appeals, which held that David Litowitz had a greater interest in the preembryos because they contained his genetic material, the Washington Supreme Court held that David Litowitz' genetic connection to the preembryos was irrelevant to the contract

issue. Instead, under the Washington Supreme Court's analysis, both parties were bound by their prior agreement. Furthermore, the Petitioner fails to provide any legal citation as to how she could ever claim to be characterized as a "parent" of a preembryo to which she has absolutely no biological connection. Once again, Becky Litowitz simply has no federal right that she can advance in this dispute.

CONCLUSION

This dispute simply does not involve any constitutional or federal question whatsoever. Instead, it simply involves a state contract issue and was decided on that basis. The Petitioner has no federal issue to advance as she has no biological connection to the preembryos at issue. For those reasons the Respondent requests this Court to deny Becky Litowitz' petition for a writ of certiorari.

Respectfully submitted,

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